

1 that the fact that it was --

2 MS. BERGOLD: Well, no. I am  
3 asking you questions.

4 MR. CARROLL: And I am agreeing  
5 with your question or what is embedded in it.

6 The fact that it might cost you  
7 money to comply with the law is not an excuse  
8 not to comply with the law. However, if I  
9 gave you a different hypothetical and said  
10 supposing the reason for a disparity in pay  
11 has to do with the fact that the man, one man  
12 was on the job for 20 years longer than the  
13 woman, I would ask you back, now is that  
14 discrimination? And I think the Supreme Court  
15 and other people would say no because now what  
16 you are telling me is sex wasn't the reason  
17 for the price difference, longevity on service  
18 was. And that is our case.

19 We preceded them by about a  
20 decade, Golf and Versus. The market has  
21 completely accepted Golf and Versus.  
22 Completely. They argue well that is ripple

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1 effect. It is funny how ripple effect gets  
2 thrown around here. That is kind of like  
3 their fallback when they don't have another  
4 answer. They say, oh that is the ripple  
5 effect. That is Comcast. They are just too  
6 big, it must be. They made a splash.

7 MS. BERGOLD: When you say the  
8 seniority case, the rationale for paying an  
9 employee who has more seniority more money is  
10 that they are more experienced.

11 MR. CARROLL: Yes.

12 MS. BERGOLD: And in --

13 MR. CARROLL: Well also --

14 MS. BERGOLD: Are you saying that  
15 Golf and Versus have better treatment because  
16 they are more experienced companies and that  
17 Tennis Channel is a startup?

18 MR. CARROLL: In part, in this  
19 respect, and it is one of the key differences  
20 between the two. And Mr. Rigdon spoke to this  
21 when he was on the stand about the incident  
22 where when he was at Charter there was an

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1 effort he made to take down Golf Channel and  
2 Versus Channel from the broad distribution and  
3 it closed down their switchboard. They had  
4 over 100,000 calls.

5 We have had almost no calls in all  
6 the time Tennis Channel has been where it is.  
7 The record will show we have lost no business  
8 to DirecTV and Dish after they did their  
9 equity for carriage deals.

10 MS. BERGOLD: Did Comcast ever  
11 make an analysis of what would happen if it  
12 put Golf and Versus on the sports channel? I  
13 mean --

14 MR. CARROLL: If you mean a  
15 spreadsheet --

16 MS. BERGOLD: -- did Comcast ever  
17 consider? I know that Charter there is  
18 evidence that Mr. Rigdon had of a lot of calls  
19 but when Comcast decided to retain Golf and  
20 Versus on broadly distributed tiers when their  
21 contracts were up, did they consider what  
22 would happen if they changed the level of

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1 coverage?

2 MR. CARROLL: I think the  
3 testimony by Mr. Bond on this, I don't have  
4 the page to cite you, is to the effect,  
5 because again, it should always be on the  
6 record in my view, not what I think --

7 MS. BERGOLD: Right. Right.  
8 Sure. No, that is what I am -- I mean was  
9 this a consideration that Comcast --

10 MR. CARROLL: My memory is that  
11 Mr. Bond said no, not really and gave a  
12 reason. He said once a channel is well-  
13 established, we hardly ever think of taking it  
14 down because it runs the risk of irritating  
15 some group of consumers who has become  
16 attached to that program. I will give you an  
17 example.

18 Supposing we like to talk about  
19 bull riding on Versus, for example, bull  
20 riding and some of the more violent  
21 activities.

22 JUDGE SIPPEL: Isn't it cage

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1 fighting?

2 MR. CARROLL: Cage fighting.  
3 There we go, another one. How that is similar  
4 to tennis escapes me but I won't get  
5 distracted with that.

6 If those were not already widely  
7 distributed, maybe you wouldn't have the  
8 following that apparently exists for that  
9 network now to follow that. And the Nielson  
10 ratings support this, by the way.

11 And by the way, this is all  
12 related to answering your question. There is  
13 evidence we have put in the record about the  
14 Nielson ratings being higher for these  
15 programs. And you know, it is very important.  
16 The Enforcement Bureau says in their brief  
17 that there is no evidence we put on the  
18 Nielson ratings issue and that is --

19 MS. BERGOLD: Do they take into  
20 account the differing coverage?

21 MR. CARROLL: Nielson actually  
22 does it right. These are Nielson local

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1 ratings and I will get you the exhibit cite  
2 for the Nielson.

3 MS. BERGOLD: Right.

4 MR. CARROLL: But at any rate, if  
5 Versus wasn't already out there at a broad  
6 distribution, maybe you wouldn't have people  
7 clamoring saying, hey, put some bull riding on  
8 the networks. Right? In other words, before  
9 it is out there, there is maybe less noise you  
10 are going to hear from the marketplace.

11 But when you have got a  
12 marketplace that has been seeing something for  
13 ten years, it creates its own following. And  
14 once that following is created, what you risk  
15 doing is antagonizing a part of your consumer  
16 base that has come to like it and enjoy it.

17 And Mr. Bond explained that. And  
18 he explained that for that reason, you seldom  
19 ever see, at least at Comcast, for one of  
20 their networks or a different network, than do  
21 that to somebody who is well established.

22 MS. BERGOLD: But Comcast does

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1 negatively reposition channels. It did it  
2 with the NFL.

3 MR. CARROLL: Well, with the NFL,  
4 it had a contractual right to do something if  
5 the NFL didn't deliver on its side of the  
6 contract.

7 MS. BERGOLD: Yes, well I mean, I  
8 presume that Comcast would not negatively  
9 reposition a channel unless it had a  
10 contractual right. But why would Comcast ever  
11 negatively reposition a channel?

12 MR. CARROLL: I remember. That  
13 was new programming, though, remember. That  
14 was the NFL created it brand new. They  
15 created that eight package of games. Up until  
16 then, they had no live programming. So the  
17 NFL wasn't an NFL games programming. What  
18 happened was the NFL announced, here are the  
19 games. They were not already out there  
20 broadly distributed. And my client said, if  
21 you are going to do that with these games,  
22 under the rights we have under the contract,

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1 we are going to put it on the sports tier,  
2 initially. That would have been an initial  
3 move. That wasn't a, after ten years of being  
4 somewhere, let's take them down.

5 Now, I will also say, as this  
6 Court well knows, we litigated the *NFL* case  
7 two years, I think it was. And our position  
8 then was it is basically all about price. And  
9 essentially, it got resolved, as the Court  
10 knows, there was no opinion required. We are  
11 all dying to know what it is you were writing  
12 that you have forgotten since then, Your  
13 Honor, that you teased us with. But my point  
14 is it was all about price.

15 This case is also all about price.  
16 And Mr. Solomon fought, fought it, fought it  
17 during my cross-examination of him but it is  
18 all over the record and it was amazing when I  
19 went back through and read the record. I  
20 mean, there is pieces of this if I have time,  
21 I would like us to refresh on and call to your  
22 attention in that regard. It is all about

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1 price.

2 Now, he knows it is all about  
3 price and they know it is all about price  
4 because remember I started to tell you about  
5 those two independent networks within four  
6 months, the Sportsman Channel and Outdoor  
7 Network? There was a snippet of testimony  
8 with Mr. Solomon in which I pointed to -- He  
9 has a document, an email in which he is  
10 conferring with one of his colleagues. This  
11 is the one with the four dollar signs, where  
12 his answer was four dollar signs. You may  
13 remember that. I will give you the cite.

14 MS. BERGOLD: Yes. Now, I do  
15 remember.

16 MR. CARROLL: And what happened  
17 was -- The transcript is at page 477 and  
18 forward. And the exhibit number for it that  
19 I was asking him about was Exhibit 707.

20 This was an exchange in October of  
21 '09. And his CFO, who is Bill Simon, by the  
22 way -- The Enforcement Bureau misnamed the CFO

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1 in its brief. They called him the advertising  
2 head, the CFO in their brief. The CFO of  
3 Tennis Channel is Mr. Simon. Mr. Simon in  
4 October of 2009 wrote to Mr. Solomon and said  
5 Comcast agreed to move the Sportsmen Channel  
6 to a more widely distributed tier, digital  
7 preferred, in markets including  
8 Minneapolis/St. Paul, Minnesota, Savannah,  
9 Georgia, and three cities in New Mexico.

10 Mr. Solomon wrote back right away:  
11 "Yup, \$\$\$\$." And then Mr. Simon wrote back  
12 and say, yes, the same with Outdoor Channel.

13 And you may remember at 477  
14 forward in the transcript, I pursued Mr.  
15 Solomon on this and I said what about this.  
16 These are independent channels and they just  
17 got more distribution than you. And this is  
18 exactly the deal that, remember, Mr. Bond  
19 testified he offered Mr. Solomon at the  
20 meeting, at the phone call in June of 2009,  
21 just three months earlier. He said, look, I  
22 am not going to give it to you nationwide but

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1 I will talk about finding regions in the  
2 country for you and working to give you  
3 broader distribution.

4 We know from this evidence, and  
5 this is why I love record evidence, this  
6 evidence proves beyond any doubt that Mr. Bond  
7 was truthful in his presentation to Mr.  
8 Solomon when he said he was willing to do this  
9 because here are two other independent  
10 networks he did it for three months later.

11 And Mr. Solomon, you may remember,  
12 I asked him, what do you those dollars signs  
13 mean. What did you mean, "Yup, \$\$\$?" And all  
14 he could say was, I don't know. I don't know.  
15 I don't remember. It was the end of the  
16 night.

17 MS. BERGOLD: But --

18 MR. CARROLL: Now we know what  
19 this means. We know sure as can be, everybody  
20 in this room, including Mr. Solomon's counsel,  
21 knows what this means. This means they cut a  
22 deal that didn't cost Comcast to give them the

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1 broader carriage. That is the very thing Mr.  
2 Bond was telling Mr. Solomon he needed to do  
3 to get broader distribution and it remains the  
4 case today.

5 MS. BERGOLD: Let's say, for  
6 example, that Mr. Solomon agreed with Mr. Bond  
7 and there was a deal cut. And there was  
8 broader coverage a certain, let's say ten  
9 percent, of Comcast's systems now took the  
10 Tennis Channel off of the sports channel and  
11 put it on a highly distributed tier. Wouldn't  
12 there still be disparate treatment?

13 I mean, how does that relate to  
14 the discrimination?

15 MR. CARROLL: There wouldn't be  
16 discrimination. I think there is disparate  
17 treatment all over the country every day.

18 MS. BERGOLD: If Golf and Versus  
19 has a 100 percent broadly distributed tier and  
20 Comcast is willing to negotiate a 20 percent  
21 broadly distributed tier, there is certainly  
22 disparate treatment there. Isn't there?

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1 MR. CARROLL: But it is not  
2 discrimination because it is not based on  
3 affiliation. The disparate treatment reflects  
4 the market.

5 Here would be my response to that.  
6 And this is an amazing fact to me, just  
7 amazing, and we lose sight of it in this case.  
8 My client was the second or third MVPD to give  
9 them any distribution back in 2005. DirecTV  
10 and Dish said no to them for years, until they  
11 gave them a third of their ownership interest.  
12 In 2009 --

13 MS. BERGOLD: Well is that fair,  
14 Mr. Carroll to say? Because I mean DirecTV  
15 and Dish are separate companies and one is --  
16 I mean, that is sort of a combined.

17 MR. CARROLL: You are quite fair.  
18 I was accumulating the interest in terms of  
19 their total amount. They gave one of the  
20 entities --

21 MS. BERGOLD: But it is two  
22 different companies. So you really shouldn't

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1 --

2 MR. CARROLL: Well only in terms  
3 of how much they were willing to spend of  
4 their equity in order to buy the distribution  
5 they bought from those two entities. That is  
6 my only point. My point was not that Dish and  
7 DirecTV are necessarily conspiring together.  
8 I grant you that. Not at all.

9 But my client, the so-called  
10 discriminator, was one of the first ones to  
11 give them carriage. They do it under a sports  
12 tier deal and Mr. Schmidt keeps rephrasing  
13 what that deal was. Look very carefully at  
14 the record. It was not a promise to melt you  
15 to a better level later on. Not at all. We  
16 had no obligation for any carriage level and  
17 the only model at the time was sports tier.  
18 And Mr. Solomon, it is in the record in one of  
19 my questions, said it was a sports tier deal.

20 MS. BERGOLD: Well I understand  
21 your argument that it was equity for carriage.  
22 My question is sort of there is record

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1 evidence that Golf and Versus, when they first  
2 launched, gave launched support.

3 MR. CARROLL: Oh, yes.

4 MS. BERGOLD: Tennis Channel, I  
5 understand, gave free air time --

6 MR. CARROLL: For a while.

7 MS. BERGOLD: -- for a while. It  
8 seems that because distribution is a very  
9 valuable commodity, the cable networks tend to  
10 give compensation to the cable company in  
11 order to get carriage or distribution.

12 MR. CARROLL: Very true.

13 MS. BERGOLD: Comcast is a very  
14 wealthy company. It can certainly afford,  
15 when it launched Golf and Versus to pay launch  
16 support, monetary compensation. Other  
17 networks may give equity or may give free  
18 time. Conceptually, how is that different?

19 I mean, you are making a big deal.  
20 Whether this was an agreement for distribution  
21 in lieu of not having free time versus an  
22 equity for carriage, how does that make a

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1 difference?

2 MR. CARROLL: In terms of the --  
3 It has some things in common and some things  
4 that are different. I think that the  
5 differences are among the following. Depending  
6 on the equity, it may not be worth what the --  
7 it may not eliminate your cost for greater  
8 distribution. The equity play, where somebody  
9 takes equity, requires you basically to become  
10 a long-term investor in them, in order to  
11 recoup what you are spending for the greater  
12 distribution up front. Dish and DirecTV have  
13 cut deals like that to make some long-term  
14 investors.

15 MS. BERGOLD: Is there anything in  
16 the record to show that Dish and DirecTV give  
17 Tennis Channel greater distribution because of  
18 their equity interest?

19 MR. CARROLL: Oh, yes. At least  
20 three things. First, the fact that neither  
21 one of them would agree to give any carriage  
22 at all, while my client was, until Mr. Solomon

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1 first made his equity for carriage proposal.

2 Second, Mr. Solomon, and this  
3 started in the transcript at page, let me just  
4 find this for you, 382 to 420 -- I had a great  
5 weekend. You can tell here.

6 So for some 40 pages of the  
7 transcript, Mr. Solomon tried to deny, in fact  
8 he began by swearing that there was no equity  
9 for carriage deal he did.

10 MS. BERGOLD: No, no. I  
11 understand that there is -- your argument  
12 about Mr. Solomon's position on equity for  
13 carriage.

14 MR. CARROLL: But his notes, which  
15 I basically impeached him with at the end,  
16 make it clear that the way he is getting the  
17 carriage, he wouldn't get the carriage except  
18 for the equity he was giving them. He refers  
19 to it as blood equity for your valuable real  
20 estate.

21 MS. BERGOLD: But you can't -- I  
22 mean, how is that different from not getting

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1 the carriage unless you pay money for it,  
2 launch support, or giving a deal where you get  
3 free air time? I mean, that is all part of  
4 the compensation package that the two  
5 companies, the network and the distributor  
6 agree with.

7 MR. CARROLL: There is nothing  
8 wrong with having done it. But when they go  
9 to compare themselves to the offer they made  
10 to me in 2009, the so-called irresistible  
11 offer, where was the launch support? There  
12 was none. They didn't my client any launch  
13 support.

14 They want my client to launch them  
15 throughout America and not pay the launch  
16 support that even Golf and Versus pays?

17 MS. BERGOLD: Yes, well they --

18 MR. CARROLL: Remember, the record  
19 shows there is hundreds of millions of  
20 dollars, this is in the record, that Golf and  
21 Versus paid in launch support in order to get  
22 that early distribution.

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1                   And remember Mr. Solomon testified  
2                   and Mr. Bond, this is one of the few things  
3                   they agreed on, Mr. Bond said, I need some  
4                   financial incentive if you want me to think  
5                   seriously about doing this on some broader  
6                   basis.

7                   MS. BERGOLD: Well, at least Mr.  
8                   Solomon thought the financial incentive was a  
9                   reduced fee.

10                  MR. CARROLL: And I leave it to  
11                  you and His Honor to judge the credibility of  
12                  his position that he thought it was  
13                  irresistible to come back with an offer that  
14                  was half as valuable as the offer he had made  
15                  about a year and a half before, when, by the  
16                  way, he had three of the same four  
17                  tournaments.

18                  The record will show this notion  
19                  that he completely changed his network in the  
20                  intervening year and a half, in 2007 before my  
21                  client made its decision on the MFN, they  
22                  already had Wimbledon, French Open, and

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1 Australia. The only one out there was the  
2 U.S. Open. They also already had an  
3 obligation, if you look at the affiliation  
4 agreement, they had an obligation to give us  
5 HD. They make it sound like they were doing  
6 us this big favor in 2009 when they offered  
7 HD. They had a contractual obligation to give  
8 us HD. We already had that contractual right.

9 And I want to draw on that point  
10 for just a moment. The contractual right is  
11 a vital piece of this story. It has to do  
12 with leverage in the business negotiation. My  
13 client had, and we heard Mr. Solomon admit  
14 that when he came onboard in 2005, he changed  
15 their strategy and said no more sports tier  
16 deals. I don't want these deals. He admitted  
17 that. But my client already had one. And he  
18 admitted that my client has a right to a  
19 sports tier under the contract.

20 Now that sports tier is vitally  
21 important for the following reason. We  
22 already have the programming. They can't

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1 threaten us the way they can threaten other  
2 carriers with not making the programming  
3 available if we don't agree to their terms.  
4 We are in a stronger bargaining position.

5 I opened my examination of Mr.  
6 Solomon on this very issue. I opened my  
7 examination with him asking about the leverage  
8 document. This is the transcript at 337, is  
9 where it starts. One of the exhibits, and it  
10 had Mr. Solomon's handwritten notes on it,  
11 this is Exhibit 121. On the second page at  
12 the bottom, had this language which you will  
13 remember, "We are pursuing repositioning of  
14 Tennis Channel off of sports tiers when we do  
15 not have the leverage of an expiring deal."  
16 That language, right there, "we do not have  
17 the leverage of an expiring deal. We had some  
18 extensive conversations with Time Warner about  
19 that sort of thing this year. The short  
20 answer is that it is not easy. If they can  
21 carry the Tennis Channel in the sports tier,  
22 they would much rather do that than carry it

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1 in a digital basic tier." Now, this is this  
2 thing written about not my client, but Time  
3 Warner. I asked Mr. Solomon in the portion of  
4 the transcript I referenced you to, "Was this  
5 discrimination?" And he didn't answer it.  
6 Your Honor had to instruct him to answer the  
7 question. And he finally admitted, no, it is  
8 not discrimination.

9 MS. BERGOLD: Well, it can't be  
10 discrimination if --

11 MR. CARROLL: It could be. I mean,  
12 if it is not for them, why is it for me?

13 MS. BERGOLD: If there is no  
14 affiliation, there can't be any disparate  
15 treatment. Right?

16 MR. CARROLL: But if there is no  
17 discrimination for Time Warner to do something  
18 like that, if that is completely okay as an  
19 independent business matter, why is my client  
20 held to some different standard? My client is  
21 exercising business rights that are just like  
22 the rest of the marketplace is exercising.

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1                   This goes to my point about what  
2           the     law     requires.           It     requires  
3           nondiscrimination.       It   doesn't   require  
4           equality.   Nondiscrimination means we can't  
5           treat them differently than Time Warner  
6           treated them.   And you don't have to guess  
7           about what a nondiscriminatory treatment would  
8           be.   This proves it.   This is what it means  
9           not to be discriminated against, taking  
10          advantage of your sports tier rights in your  
11          negotiations and trying to negotiate a better  
12          deal.   That is all my client did in this case.

13                   What my client is accused of and  
14          they are asking you to basically convict him  
15          of and impose forfeiture damages for this  
16          horrific things, is they exercised their  
17          business rights under a contract they signed  
18          and now don't like that gave my client sports  
19          tier rights.

20                   MS. BERGOLD:   Now do you think  
21          that, I mean there is no question that Comcast  
22          is acting lawfully in terms of its, or within

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1 the terms of its contract. Are you saying  
2 that if it is lawful within the terms of the  
3 contract, it is lawful under Section 616?

4 MR. CARROLL: No. I'm smiling  
5 because no, I would never go that far.

6 MS. BERGOLD: No. I mean --

7 MR. CARROLL: There would be a  
8 limit but I know that I am not past the limit  
9 when the marketplace is behaving exactly as I  
10 am.

11 If I were doing something to them  
12 that was out of line with the marketplace,  
13 that would be evidence for you to look at and  
14 go, maybe there is something else going on  
15 here. But this is exactly what the market, I  
16 am holding up for the record this Exhibit 121,  
17 as an illustration of that.

18 And that is the power by the way,  
19 there was a question that the Bench asked  
20 during Mr. Schmidt's portion about are there  
21 other MVPDs who are giving Tennis Channel  
22 greater carriage. That list, which is in the

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1 record I think at Exhibit 1103, is a  
2 fascinating document because yes, there are  
3 some that are giving greater. None are giving  
4 as much as they are asking you to award them  
5 now.

6 They are asking for an award of 85  
7 percent distribution. The highest  
8 distribution they have got --

9 MS. BERGOLD: Is that really fair,  
10 Mr. Carroll? Aren't they asking for parity  
11 with Golf Channel and Versus? That if Golf  
12 Channel and Versus were on the sports tier,  
13 they would be happy to remain on the sports  
14 tier.

15 MR. CARROLL: Do you really  
16 believe they would be happy to remain on the  
17 sports tier?

18 MS. BERGOLD: No but I mean, that  
19 is what they --

20 MR. CARROLL: Nobody believes  
21 that.

22 MS. BERGOLD: Isn't that what they

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